IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 10-1322

ICO GLOBAL COMMUNICATIONS (HOLDINGS) LTD., *ET AL*.

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The parties to this case are:

Petitioner in No. 10-1322: ICO Global Communications (Holdings) Ltd. (ICO);

Petitioners in No. 10-1401: New DBSD Satellite Services, G.P.; DBSD North America, Inc.; DBSD Satellite Management, LLC; DBSD Satellite North America, Ltd.; DBSD Satellite Services G.P.; DBSD Satellite Services Limited; SSG UK Limited; 3421554 Canada Inc. (collectively, DBSD)

Respondents: the Federal Communications Commission; and the United States of America.

2. Ruling under review.

The ruling under review is *Improving Public Safety Communications in the 800 MHz Band*, Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling, FCC No. 10-179, 25 FCC Rcd 13874 (2010) (JA 189).

3. Related cases.

Litigation related to the matter before this Court is pending in three cases, which are described in the related cases certificate of the petitioners. Br. iii-iv. *See Sprint Nextel Corp. v. New ICO Satellite Servs. G.P., et al.*, No. 1:08-cv-651 (E.D. Va.); *In re DBSD N. America, Inc., et al.*, No. 09-13061 (Bankr. S.D.N.Y.); *Sprint Nextel Corp. v. ICO Global Communications (Holdings) Ltd.*, No. 1:10-cv-01414 (E.D. Va.). In addition, bankruptcy proceedings involving TerreStar, which is not a party to this case but whose interests may be affected by the order before the Court, are pending. *In re TerreStar Corp.*, No. 11-10612 (Bankr. S.D.N.Y.).

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GLOSSARY

AWS	Advanced Wireless Service. A terrestrial wireless communications service.
BAS	Broadcast Auxiliary Service. A service that is used to provide adjuncts to television broadcasting, such as live news feeds.
DBSD	All of the petitioners here other than ICO. Among the DBSD petitioners is New DBSD Satellite Services G.P., (formerly known as ICO Satellite Services, and then New ICO Satellite Services) which holds an MSS provider authorization from the FCC. All of the DBSD petitioners are debtors in *In re DBSD N. America, Inc., et al.*, No. 09-13061 (Bankr. S.D.N.Y.).
GHz	Gigahertz. A measure of radiofrequency at one billion cycles per second.
ICO	Petitioner ICO Global Communications (Holdings) Ltd. ICO is the ultimate parent of the DBSD petitioners. For simplicity, ICO refers to the currently named entity and all of its immediate predecessors.
MHz	Megahertz. A measure of radiofrequency at one million cycles per second.
MSS	Mobile Satellite Service. A service that allows mobile communication via satellite.
Sprint	Sprint Nextel Corp. Sprint Corp and Nextel Communications merged in 2005. For simplicity, "Sprint" refers to both companies as well as to the combined company.

GLOSSARY OF FCC ORDERS

800 MHz Order	*Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969 (2004).
800 MHz Reconsideration Order	*Improving Public Safety Communications in the 800 MHz Band*, 20 FCC Rcd 16015 (2005).

1997 MSS Order *Mobile Satellite Service*, 12 FCC Rcd 7388 (1997).

2000 MSS Order *Mobile Satellite Service*, 15 FCC Rcd 12315 (2000).

2003 MSS Order *Mobile Satellite Service*, 18 FCC Rcd 23638 (2003).

2008 BAS Order *Improving Public Safety Communications in the 800 MHz Band*, 23 FCC Rcd 4393 (2008).

2009 BAS Order *Improving Public Safety Communications in the 800 MHz Band*, 24 FCC Rcd 7904 (2009) (JA 47).

2010 BAS Order *Improving Public Safety Communications in the 800 MHz Band*, 25 FCC Rcd 13874 (2010) (JA 189).

Emerging Technologies Orders:

Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994), *aff'd Ass'n of Public Safety Communications Officials-Int'l, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996).

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BRIEF FOR RESPONDENTS

JURISDICTION

The Court has jurisdiction over final orders of the Federal Communications Commission under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Pursuant to 47 U.S.C. § 405(a), the Court lacks jurisdiction over claims that the Commission improperly defined the phrase "enter the band," which petitioners did not raise before the agency.

QUESTIONS PRESENTED

In the order on review, *Improving Public Safety Communications in the 800 MHz Band*, 25 FCC Rcd 13874 (2010) (*2010 BAS Order*) (JA 189), the Commission completed reorganization of the 2 GHz spectrum band, which

involved relocating existing licensees to new spectrum assignments. In prior orders intended to maximize use of the band by freeing up spectrum that could support new technologies, the Commission required communications providers moving into the band to share the costs of relocating the incumbent licensees.

Sprint Nextel Corp. ("Sprint"), one recipient of the freed-up spectrum, ultimately paid about $750 million to relocate the incumbents and sought to recover a fair share of its band-clearing expenses from petitioners, beneficiaries of Sprint's efforts. Petitioners have disavowed any obligation to share those expenses.

The Commission reached three decisions at issue here: (1) it clarified the meaning of a term – "enter the band" – that triggers the responsibility of band entrants to contribute to the costs of band clearing; (2) it resolved a dispute between Sprint and petitioners concerning the cutoff date for cost-sharing liability; and (3) it established criteria for determining whether petitioner ICO, the parent of the DBSD petitioners, could be liable for relocation costs. The questions presented are:

1) Whether petitioners' arguments that the Commission improperly interpreted "enter the band" are barred by 47 U.S.C. § 405(a) because they were not raised before the agency; and if the Court has jurisdiction over those

claims, whether that interpretation was consistent with principles forbidding retroactive rulemaking, requirements of fair notice, and Commission precedent;

2) Whether the Commission acted consistently with principles forbidding retroactive rulemaking and Commission precedent when it reiterated that its prior orders had not set a predetermined cutoff date for cost-sharing liability and established a cutoff date;

3) Whether the Commission acted within its discretion in establishing criteria for determining whether ICO must share relocation costs because it acted in concert with its DBSD affiliates as an integrated enterprise.

STATUTES AND REGULATIONS

Pertinent materials are contained in the appendix.

COUNTERSTATEMENT

Sprint spent nearly $750 million to relocate incumbent spectrum users so that it and other companies could use that spectrum. Sprint did so in reliance upon a series of FCC orders establishing that any company that bore relocation costs would be equitably entitled to reimbursement for a pro rata portion of the costs from other incoming users of the band. Petitioners benefited from Sprint's band clearing efforts but have refused to pay their fair

share of the expenses, leaving Sprint to foot the entire bill and potentially discouraging future band clearing efforts.

1. Reorganization Of The 2 GHz Band And Assignment Of Relocation Responsibilities To MSS Providers.

Before 1997, the spectrum band from 1990 MHz to 2110 MHz, known as the 2 GHz band (one gigahertz is 1000 megahertz), had been assigned to the broadcast auxiliary service (BAS), which supports television broadcasting adjuncts such as live on-location news feeds. When new technology made it feasible to provide the same service using less spectrum, the Commission reallocated part of the BAS spectrum for use by Mobile Satellite Services (MSS), which are wireless mobile communication services provided via satellite. *See Mobile Satellite Service*, 12 FCC Rcd 7388 ¶14 (1997) (*1997 MSS Order*); *Mobile Satellite Service*, 15 FCC Rcd 12315, 12322-12323 (2000) (*2000 MSS Order*).

Because electromagnetic interference prevents BAS and MSS operations from using the same spectrum simultaneously, the Commission segregated BAS and MSS into separate spectrum zones. BAS licensees would be relocated to new spectrum, a complex and expensive process. Invoking a number of prior orders governing reassignments in other services, known collectively as the "*Emerging Technologies*" orders, the Commission required incoming MSS providers to bear the relocation costs. *See 2000 MSS*

Order ¶6. Under the *Emerging Technologies* principles, any incoming user that paid for BAS relocation would be entitled to pro rata (based on its spectrum allotment) cost reimbursement from later band entrants. *See Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825 (1996).

Cost-sharing avoids a free-rider problem by ensuring that costs will not be borne disproportionately by any party, thus averting a disincentive to be the first user of a new band. *1997 MSS Order* ¶72. Cost-sharing thus protects the public interest in putting spectrum to its most efficient use. If all the costs of band clearing fell on the first user, "future licensees might be unwilling or unable to assume the burden and cost of clearing spectrum quickly if they were unsure of the likelihood that they will be reimbursed by other new entrants." *2010 BAS Order* ¶41 (JA 207).

To minimize disruption to broadcasters' operations, MSS providers were required to relocate BAS licensees in the 30 largest television markets before beginning satellite operations – the "top-30 market" rule. *2000 MSS Order* ¶31; *see also Mobile Satellite Service*, 18 FCC Rcd 23638 ¶38 (2003) (*2003 MSS Order*) (retaining rule). To give BAS incumbents incentive to relocate, *2000 MSS Order* ¶109, the Commission decided that any incumbent that did not move by the "band sunset date" would have to bear its own relocation costs; also at that point, the bearer of band clearance expenses

would no longer have a right to reimbursement. *See 2000 MSS Order* ¶¶29-33. The sunset date was to occur ten years after the August 7, 2000, Federal Register publication of the *2000 MSS Order*. *Id*. ¶52; 65 Fed. Reg. 48174.

Eight companies were authorized to use the MSS spectrum. Although MSS providers were responsible for clearing the band (and were barred from commencing operations until the BAS licensees had been moved in the top 30 markets), between 1997 and 2004, "there was no evidence" that MSS operators had engaged in "any meaningful relocation negotiations" to move the BAS licensees. *Improving Public Safety Communications in the 800 MHz Band*, 23 FCC Rcd 4393 ¶11 (2008) (*2008 BAS Order*). Due to that failure, the Commission extended the band sunset date to December 9, 2013. *2003 MSS Order* ¶47.

2. Allocation Of 2 GHz Spectrum To AWS And Sprint And New MSS Cost-Sharing Obligations.

MSS providers were required as a condition of their authorizations to meet a series of progress "milestones," the last of which was that the "entire system … be launched and operational within six years of authorization." *Policies and Service Rules for the Mobile Satellite Service*, 15 FCC Rcd 16127 ¶106 (2000). Six of the original eight MSS companies were unable to meet their milestones and lost their authorizations, reducing the spectrum needed by MSS. Today, the only remaining MSS providers are TerreStar

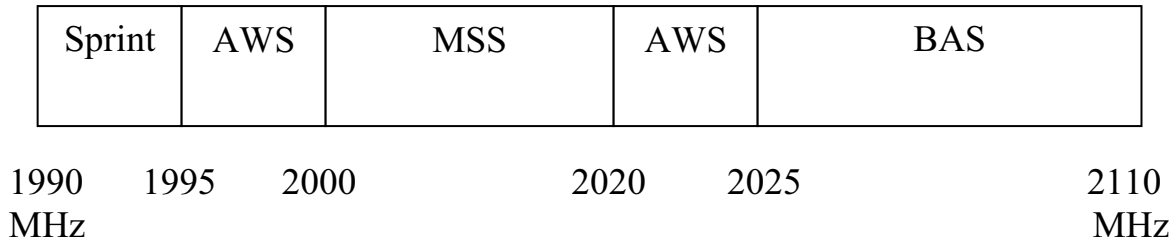
Networks, Inc. and petitioner New DBSD Satellite Services, G.P. (DBSD).[1] In 2003, recognizing the reduced demand for 2 GHz spectrum, the Commission reassigned a portion of the MSS spectrum to Advanced Wireless Service (AWS). *See Advanced Wireless Service*, 18 FCC Rcd 2223, 2238-2242 (2003).

The Commission recognized that AWS licensees "will benefit from the band clearing paid for by MSS licensees," and pledged to "provide an equitable mechanism" for cost sharing. *2003 MSS Order* ¶9. But the agency deferred the creation of "a comprehensive set of procedures" for reimbursement because the future use of the band "may affect the manner by which we apply the general cost-sharing principles embodied in the *Emerging Technologies* procedures." *Id.* ¶10.

The following year, the Commission awarded Sprint a license for 5 of the 15 megahertz of AWS spectrum. Thus, the current spectrum assignments

[1] DBSD was originally named ICO Satellite Services, then became New ICO Satellite Services. Although New DBSD Satellite Services holds the MSS authorization, "DBSD" will refer collectively to all of the petitioners in No. 10-1401.

in the 2 GHz band are as follows (not to scale):



Sprint received its 2 GHz spectrum as part of the Commission's effort to reorganize another spectrum area, the 800 MHz band. In that reorganization, Sprint, agreed to relinquish some of its 800 MHz spectrum – valued at over $2 billion – and pay for 800 MHz band reorganization in exchange for 5 megahertz of spectrum in the 2 GHz band and another 5 megahertz in an adjoining band. *See Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969 (2004) (*800 MHz Order*); *see also Improving Public Safety Communications in the 800 MHz Band*, 24 FCC Rcd 7904 ¶75 n.173 (2009) (*2009 BAS Order*) (JA 77). Sprint also agreed to relocate BAS incumbents in the entire 2 GHz band even though it would have only 5 of the 35 megahertz newly available in the band.

Despite Sprint's agreement to relocate the BAS incumbents, the Commission maintained the independent responsibility of MSS operators to relocate BAS providers, thus "overlaying" the two relocation obligations. *800 MHz Order* ¶250.

The Commission did not apply the top-30 market rule to Sprint because its site-specific terrestrial network has interference characteristics different from MSS systems, the signals of which can cover the entire country and thus interfere pervasively with BAS operations. *800 MHz Order* ¶255. Instead, the Commission allowed Sprint to "determine its own schedule for relocating incumbent BAS facilities," *ibid.*, rather than targeting the largest markets first. An MSS operator that wished to provide service prior to Sprint's having cleared the top 30 markets "will retain the option of accelerating the clearing of those markets so that they could begin operations before [Sprint] has completed nationwide clearing." *Id.* ¶257.

The *800 MHz Order* required Sprint to file a plan showing the order in which Sprint proposed to clear BAS markets. DBSD and other MSS entrants "then had 30 days to review this plan and identify which of the top 30 markets they intended" to clear themselves. *2008 BAS Order* ¶13. After Sprint submitted its plan, which did not include clearing several of the top 30 markets in the first phase, "no MSS entrant opted to invoke its right to relocate BAS licensees in any of the top 30 markets that had not been identified" by Sprint. *Ibid.* DBSD ever took any step to relocate any BAS licensee, leaving that task entirely to Sprint.

3. Cost Reimbursement For BAS Relocation.

In the *800 MHz Order*, the Commission instituted "an equitable mechanism" for BAS relocation cost reimbursement. *Id.* ¶259. The Commission decided "to generally follow the cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit." *Id.* ¶261.

The Commission deviated from the general rule in two ways. First, Sprint could obtain reimbursement from MSS operators only for the cost of relocating BAS in the top 30 markets, plus all fixed (as opposed to mobile) BAS links in any market; other costs would be borne by Sprint alone. Second, Sprint's 2 GHz spectrum was valued at close to $5 billion, *800 MHz Order* ¶297, and the Commission wanted to ensure that Sprint was not unjustly enriched by the spectrum grant. Sprint therefore would be entitled to reimbursement for BAS relocation costs only if its total costs for BAS and 800 MHz band reorganization, plus the value of Sprint's relinquished 800 MHz spectrum, exceeded the value of the 2 GHz spectrum. *Id.* ¶261; *2010 BAS Order* ¶6 (JA 191-192).

If the value of the 2 GHz spectrum that Sprint received exceeded the company's costs, Sprint would make a "true-up" payment to the government

for the difference. Following the true-up, Sprint "would no longer be entitled to reimbursement from other entrants to the band after receiving credit for its relocation costs." *800 MHz Order* ¶261. That mechanism would avoid an effective double payment to Sprint.

On the other hand, if Sprint's costs plus the approximately $2 billion value of its surrendered spectrum exceeded the value of the new 2 GHz spectrum, Sprint would be entitled to pro rata reimbursement from MSS operators under the general cost-sharing principle. *Ibid.* The Commission reminded all 2 GHz users that "[b]oth [Sprint] and MSS licensees under the MSS plan must clear the entire [2 GHz] band." *Id.* ¶262.

The Commission expected that the 800 MHz band reorganization would take 36 months and that the true-up payment would occur no later than 6 months thereafter. *800 MHz Order* ¶330. On that understanding, the Commission stated that Sprint "is entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during the 36-month reconfiguration period from MSS licensees that enter the band prior to the end of that period." *Id.* ¶261. The Commission did not define what constituted "entering the band," thus triggering a cost-sharing obligation, but it determined that "the two relocation plans will complement each other" since both MSS providers

"must certify that their systems are operational by no later than July 2007," within the 36-month period. *Id.* ¶270.

On reconsideration of the *800 MHz Order*, the Commission rejected an argument by MSS operators that their obligations should terminate if they did not enter the band by the end of the BAS relocation process (as opposed to the 36-month expected period for the 800 MHz band reorganization). TerreStar's system was not expected to be operational by that time, which would have excused it from cost-sharing. The agency explained that it "has adhered to the cost sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit." *Improving Public Safety Communications in the 800 MHz Band*, 20 FCC Rcd 16015 ¶111 (2005) (*800 MHz Reconsideration Order*).

The Commission also explained that the *800 MHz Order* had tied the cutoff date for cost-sharing to completion of the 800 MHz true-up. *See 800 MHz Reconsideration Order* ¶113 ("The Commission decided to end the reimbursement obligations" of the MSS operators "at the end of the 800 MHz band true-up period for administrative efficiency in the accounting process …."); *see also id.* ¶112 ("once the 'true-up is completed, [Sprint] Nextel may not obtain reimbursement from subsequent entrants to the band."). The

agency declined petitioners' request to shorten the cost-sharing time frame and decided instead to "maintain the schedule previously established, *i.e.*, the true-up period." *Id.* ¶113.

4. Revisions To The Anticipated Schedules.

At the time of the *800 MHz Order*, the Commission expected that BAS clearing would be completed in 30 months, by May 2007, *800 MHz Order* ¶252, and that the reorganization of the 800 MHz band would take 36 months, *id.* ¶28. Band reorganization began on June 26, 2005, and thus was expected to end on June 26, 2008. *See Improving Public Safety Communications in the 800 MHz Band*, 23 FCC Rcd 18512 ¶5 (2008). At the same time, the Commission expected MSS providers to have operational satellite systems before that time – no later than July 2007. *800 MHz Order* ¶270. In that expected scenario, there would be no question about cost-sharing responsibility.

Those expectations proved overly optimistic on every front. By 2005, DBSD had asked the Commission to extend its launch and operational milestones, and it requested several additional extensions after that. *See ICO Satellite Services*, 20 FCC Rcd 9797 (Int'l Bur. 2005). Ultimately, the Commission extended the deadline for DBSD to have an operational system to May 2008. *See* Attachment To Grant File Nos. SAT-MOD-20070806-

00110 and SAT-AMD-20071109-00155 (Int'l Bur. April 2, 2008). Pursuant to that milestone deadline, DBSD launched its satellite in April 2008 and certified the following month that its system was operational.

On Sprint's side, the BAS relocation process proved far more difficult than anticipated because of unexpected technical complexity and a shortage of available equipment and installers. *See 2008 BAS Order* ¶¶20, 31. Sprint sought an extension, which the Commission granted on the ground that "the record illustrates many valid reasons" why Sprint "was unable to achieve timely relocation of the BAS incumbents," including the unusual and unexpected complexity of BAS. *Id.* ¶¶31-32. The Commission established a new deadline of March 5, 2009. *Id.* ¶37.

Despite what the Commission found to be Sprint's "good faith effort to increase the pace of the BAS transition," that deadline, too, was extended two more times, ultimately until August 9, 2010. *See Improving Public Safety Communications in the 800 MHz Band*, 25 FCC Rcd 1294 (OET 2010). Sprint completed the BAS relocation in July 2010. *See* July 15, 2010, *ex parte* (JA 161).

DBSD took no steps to relocate any incumbent BAS licensee. Sprint spent approximately $750 million on the relocation, *see id.* (JA 161); the

MSS providers' total pro rata share of that amount is about $200 million, *see* July 8, 2010, *ex parte* at 2 (JA 142).

The 800 MHz band reorganization likewise proved to be far more complex than contemplated and has been subject to delays. Instead of being completed by June 26, 2008, the process is still underway today. Because the band reorganization has not been completed, the subsequent true-up process has not yet occurred. The true-up is currently scheduled for December 31, 2011. *See Improving Public Safety Communications in the 800 MHz Band*, Order No. DA 11-1076 (PSHSB June 20, 2011).

Neither MSS operator has reimbursed Sprint for relocation expenses. In June 2008, Sprint sued DBSD and TerreStar for their pro rata contributions. *Sprint Nextel Corp. v. New ICO Satellite Servs. G.P.*, No. 1:08-cv-651 (E.D. Va.). In August 2008, under the doctrine of primary jurisdiction, the district court referred to the FCC all questions in the case, which has been stayed in the meantime. Order of Aug. 29, 2008. Subsequently, in May 2009, all of the DBSD petitioners (but not ICO) declared bankruptcy. *In re DBSD North America, Inc.*, No. 09-13061 (Bankr. S.D.N.Y.). TerreStar also declared bankruptcy. *In re TerreStar Corp.*, No. 11-10612 (Bankr. S.D.N.Y.). In December 2010, Sprint sued ICO, DBSD's parent company, seeking reimbursement. *Sprint Nextel Corp. v. ICO Global*

Commc'ns (Holdings) Ltd., No. 1:10-cv-01414 (E.D. Va.). That case has been stayed pending the outcome of this proceeding.

5. *2009 BAS Order.*

The *2009 BAS Order* comprises a decisional order and a further notice of proposed rulemaking. The order eliminated the top-30 market rule and reset the BAS relocation deadline as described above. JA 60, 61-65. The Commission also began a rulemaking to finalize the BAS relocation process (still pending at the time) and to address the disputes between MSS operators and Sprint.

In the further notice of proposed rulemaking, the Commission first explained the existing cutoff date rule for cost-sharing liability for BAS relocation – the subject addressed in the *800 MHz Order* and the *800 MHz Reconsideration Order*. *See* pages 11-12, *supra*. This was an issue because MSS operators had refused to reimburse Sprint, arguing that paragraph 261 of the *800 MHz Order* extinguished their liability 36 months after the start of 800 MHz band reorganization – *i.e.*, on June 26, 2008.

Interpreting its earlier order, the Commission recognized that "a narrow, literal interpretation of certain language" in paragraph 261 – referring to a 36-month cutoff period – could support the MSS providers' view. *2009 BAS Order* ¶78 (JA 78). But that approach "would arguably undermine the

stated purposes of the BAS cost-sharing regime set up by the Commission." *Id*. ¶79 (JA 78). Moreover, nothing in the *800 MHz Order* or any other order "suggests that the Commission limited the time … to provide an independent benefit to MSS entrants." *Id*. ¶80 (JA 78). Thus, "the most logical and appropriate interpretation of the language in the 800 MHz orders is that the MSS entrants must pay their *pro rata* share of BAS relocation costs to the extent that they enter the band before the 800 MHz rebanding or true up is complete." *Ibid*. (JA 79).

Turning to specific proposed rules, the Commission noted that, under the existing cost-sharing rule, there was no "future date certain for completing either the 800 MHz rebanding or the true up." *2009 BAS Order* ¶80 (JA 79). The Commission thus sought comment on a proposal to cut off reimbursement responsibilities on the BAS sunset date of December 9, 2013. *Id*. ¶82 (JA 79).

The Commission also proposed to define what it means to "enter the band." The *800 MHz Order* had used that term to describe the trigger for MSS operator cost-sharing responsibility "but did not define" it. *2009 BAS Order* ¶89 (JA 82). Under the Commission's general approach to reimbursement of band clearing costs, a later entrant must pay at the point that it "would have been in a position to have caused interference to the

incumbent." *Ibid*. Because MSS systems "are capable of providing nationwide coverage," any operational satellite system is "capable of causing interference to any" BAS licensee. *Id*. ¶91 (JA 83). The agency thus sought comment on the proposal that "an MSS entrant will have entered the band and incurred a cost sharing obligation when it certifies that its satellite is operational for purposes of meeting its operational milestone." *Id*. ¶¶91, 100 (JA 82-83, 86).

6. *2010 BAS Order*.

The order on review has two components: a Declaratory Ruling adjudicating several disputes between the parties, and a Report and Order that follows from the further notice of proposed rulemaking in the *2009 BAS Order*.

a. Reiteration That Repayment Obligations Did Not End On June 26, 2008.

The Declaratory Ruling ratified the rejection in the *2009 BAS Order* of MSS providers' claim that reimbursement obligations ended on June 26, 2008. The *800 MHz Order* did not create such a cutoff date, the Commission reiterated; rather, "the most logical and appropriate interpretation of the 800 MHz orders is that MSS … entrants have an obligation to share in the cost of relocating the BAS incumbents if they enter the band prior to the completion of the 800 MHz realignment or true-up." *2010 BAS Order* ¶20 (JA 196);

accord, *2009 BAS Order* ¶¶78-79 (JA 78); *800 MHz Reconsideration Order* ¶¶112-113.

The Commission explained that the 36-month period for 800 MHz band reorganization did not limit MSS reimbursement responsibility. Rather, it was simply the time "during which the 800 MHz reconfiguration was *expected* to be completed." *2010 BAS Order* ¶22 (JA 197) (emphasis added). The *800 MHz Order* thus cut off reimbursement obligations not at 36 months, but no sooner than the "completion of the 800 MHz band reconfiguration." *Ibid.* The Commission had made that point explicitly in the *800 MHz Reconsideration Order*, when it ruled that the cutoff "was tied to the 800 MHz true-up period." *Ibid.*[2]

The MSS providers' contrary interpretation, the Commission found, "is unreasonable." *2010 BAS Order* ¶24 (JA 198). "The goal of the *800 MHz [Order]* clearly was not to provide a benefit to the MSS entrants," but only to "provid[e] administrative efficiency in the accounting process" for the "calculation of the anti-windfall payment." *Ibid.* In other words, the 36-month period was not "a means for the MSS entrants to avoid paying BAS relocation expenses." *Ibid.* Interpreting the *800 MHz Order* as having

[2] Because the Commission established a specific cutoff date, it did not address whether the existing cutoff occurred upon band reorganization or the true-up. *2010 BAS Order* ¶23 (JA 197).

established a cutoff date in June 2008 "would both fail to provide any practical administrative benefits and would undermine the larger principle that MSS entrants must pay their *pro rata* share of the BAS relocation costs." *Ibid.*

Nor could the MSS providers reasonably expect that Sprint would bear *all* BAS relocation costs. From the time of the *1997 MSS Order*, MSS operators were always independently responsible for relocating BAS incumbents, and that did not change in 2005 when Sprint was awarded 2 GHz spectrum. *2010 BAS Order* ¶21 (JA 196-197). Instead, the Commission "explicitly kept in place the [MSS] obligation … to relocate" BAS. *Id.* ¶22 (JA 197).

Moreover, the Commission had never suggested in any of its orders that adjusting the schedules for the BAS and 800 MHz band reorganizations would relieve MSS operators of their responsibility to share costs with Sprint. "Considering the great cost of the BAS relocation, if the Commission had intended to upend the BAS relocation cost sharing scheme … it would have affirmatively stated" as much. *2010 BAS Order* ¶25 (JA 199). To deem silence tantamount to a decision with such significant monetary consequences, the Commission held, "is unreasonable." *Ibid.*

The Commission rejected claims that Sprint was responsible for delays in BAS relocation and thus should bear all of the costs. "Given the

unanticipated complexities of the BAS transition, we do not believe it appropriate to penalize the party who has undertaken the difficult task of band clearing at the expense of those who will also receive the benefit of the cleared spectrum." *2010 BAS Order* ¶26 (JA 199). That was particularly so "when the BAS relocation had been moribund for the four years that MSS entrants had the sole responsibility to clear BAS." *Ibid*. Were it not for Sprint, "the MSS entrants most likely would have experienced similar complexities and delays … while also having to shoulder a financial obligation far more burdensome than any cost sharing obligation" to Sprint. *Ibid*.

b. Clarification Of ICO's Potential Reimbursement Responsibility.

The Declaratory Ruling also addressed the conditions under which ICO could be liable for BAS relocation costs. *2010 BAS Order* ¶¶28-40 (JA 200-207). The Commission first explained ambiguities in prior orders, which interchangeably referred to an MSS "entrant," "operator," and "licensee" as the entity responsible for cost sharing. *2010 BAS Order* ¶29 n.68 (JA 201). Rejecting petitioners' contrary argument, *see* ICO July 30 *ex parte* letter at 1 (JA 165), the Commission concluded that collectively those terms did not refer only to the nominal MSS licensee. *2010 BAS Order* ¶30 (JA 201). Rather, affiliates of the MSS licensee could be liable for reimbursement costs

if they were part of an integrated enterprise entering the band and operating the MSS system as a unit. In that situation, the Commission may "treat the separate entities as one and the same for purposes of regulation.'" *2010 BAS Order* ¶33 (JA 202-203) (citation omitted).

Turning to the dispute between Sprint and ICO Global, the Commission concluded that if ICO divided up the regulatory actions necessary to enter the band and operate the system (such as contracting to construct, own, and operate the satellite) between various subsidiaries and directed and coordinated those subsidiary actions so that the integrated enterprise acted as a unit, then under Commission precedent the entire enterprise could be held responsible for the reimbursement costs. *2010 BAS Order* ¶35 (JA 204-205).

The record showed that ICO and its subsidiaries operated as an integrated enterprise prior to a 2005 restructuring. *2010 BAS Order* ¶¶36-37 (JA 205-206). ICO asserted that after the restructuring, DBSD operated independently. *Id.* ¶38 (JA 206). Sprint disputed ICO's description of the post-2005 operations. *Id.* ¶39 (JA 206-207).

The debate over the significance of the 2005 restructuring on ICO's potential liability arose shortly before issuance of the *2010 BAS Order*. *See* ICO Sept. 1, 2010 *Ex parte* letter (JA 185). Rather than delay the order to

resolve the factual dispute, and given that Sprint had indicated its intention to sue ICO for reimbursement in federal court, the Commission decided to leave the factual development to the district court. *2010 BAS Order* ¶40 (JA 207).

c. Definition Of "Enter The Band."

In the accompanying Report and Order, the Commission explained the meaning of the term "enter the band," which it had not defined in earlier orders. *2010 BAS Order* ¶46 (JA 209). The Commission "look[ed] to [its] prior *Emerging Technologies* proceedings" for guidance. *Id.* ¶48 (JA 210). Under those policies, a band entrant must share relocation costs if it "would have caused interference to the incumbent licensees." *Ibid.* In the MSS context, with nationwide signal coverage and the incompatibility of MSS and BAS use of the same spectrum, "once the … satellites are operational, they would have the potential for causing interference" with BAS. *Id.* ¶49 (JA 210). An MSS operator thus would "enter the band" under the *Emerging Technologies* test when it "certifies that its satellite is operational." *Ibid.*

The Commission distinguished the MSS context from other band clearing contexts, which use a "market-by-market or system-by-system test for incurring cost sharing liability." *2010 BAS Order* ¶49 (JA 210-211). Such a test would not be "practical or appropriate" given the "highly integrated nationwide" service provided by BAS as well as the "nationwide

nature of MSS." *Ibid.* The operational-satellite test is "easy to apply and not subject to contention." *Ibid.*

d. Establishment Of A Date-Certain For The Cost-Sharing Cutoff.

The Report and Order established a firm termination date for reimbursement of Sprint's BAS relocation expenses. Under the *Emerging Technologies* principles, the Commission found, the band sunset date also serves as the cutoff date for reimbursement obligations. *2010 BAS Order* ¶44 (JA 208-209).

SUMMARY OF ARGUMENT

From the beginning of MSS service in 1997, the Commission made clear that MSS providers benefiting from the relocation of BAS licensees in the 2 GHz band must pay their fair share of the relocation costs. Cost sharing is not only equitable, but is also necessary to further the important public interest in putting spectrum to its greatest use. A regulatory scheme that fails to ensure sharing of band-clearance expenses provides a strong disincentive for any company to agree to undertake the significant expense and burden of clearing spectrum, thereby impeding efforts to expand public access to new services.

Sprint spent $750 million on BAS relocation. Despite the Commission's plain intent that MSS providers share the burden, DBSD made

no effort to clear the 2 GHz band and has resisted payment to Sprint in multiple fora. In this Court, petitioners read the FCC's orders as having created a reimbursement obligation that is not triggered until petitioners begin commercial operations (which has not yet happened), yet was permanently extinguished three years ago. The Commission did not create such an illusory obligation, and the Court should reject petitioners' effort to avoid the Commission's equitable cost-sharing regime.

1. Petitioners did not raise their "enter the band" arguments before the Commission, and they may not raise them now. The Commission explicitly called for comment on a proposed definition of that phrase, but petitioners did not respond. They now make new arguments, none of which the Commission had an opportunity to confront. All of those arguments are barred by 47 U.S.C. § 405(a).

2. The Commission's definition of "enter the band" is not retroactive. The *800 MHz Order* clearly established that MSS operators would share BAS relocation costs and was predicated on the expectation that those operators would have an operational system before 800 MHz reorganization was completed. The trigger for cost-sharing thus was tied to system operation. When the Commission expressly defined "enter the band," it imposed no new requirement on DBSD. Nor did the Commission change

any vested expectation that DBSD would bear no cost-sharing obligation until it began commercial operations. The four-part test on which petitioners base their claim of a vested right applies to bands other than the 2 GHz band and does not apply to BAS relocation. The definition did not upset any legitimate reliance interests: petitioners launched their satellites in order to meet regulatory requirements, not because they relied on any particular definition of the term "enter the band."

The Commission's definition is consistent with principles of fair notice. Petitioners always had notice that they would be required to share costs and they did not rely on their own four-part definition of "enter the band." Moreover, the fair notice doctrine only applies when an agency imposes a punishment and not in a non-punitive context. It is not unfair if petitioners bear some costs before they begin commercial operations; that is exactly what Sprint had to do.

3. If the Court rejects petitioners' "enter the band" arguments either under Section 405(a) or on the merits, the cutoff-date question is moot because, by declaring their satellite operational in May 2008, petitioners entered the 2 GHz band under the applicable definition before petitioners' suggested cutoff of June 26, 2008. In any event, the Commission properly interpreted its prior orders to conclude that it had not established that date as

a firm cutoff. The orders made clear that Sprint was entitled to reimbursement for its band-clearing efforts through at least the end of the 800 MHz band reorganization – an event that has not yet occurred. The *800 MHz Order* spoke of a 36-month reimbursement period as shorthand for the expected duration of band clearing, not as a predetermined cutoff date.

4. The Commission properly concluded that ICO potentially could be held responsible for band clearing costs. Prior orders had referred ambiguously and interchangeably to MSS "entrants," "licensees," and "operators." In clarifying that those terms could include entities other than the MSS licensee itself, the Commission did not impose "derivative" liability on ICO, but instead ruled that ICO could be held liable *for its own actions* as part of an integrated enterprise. Common law standards for piercing the corporate veil are irrelevant in such circumstances.

In reaching that conclusion, the Commission adjudicated a concrete dispute between Sprint and ICO, even though it did not render a final judgment on ICO's liability. Because retroactivity is the norm for adjudicatory rulings, the Commission did not act impermissibly.

The Commission's determination of ICO's potential liability is not precluded by judicial decisions in the *DBSD* bankruptcy case. Neither the Commission nor ICO was a party to that case, and the bankruptcy court did

not render a judgment on Sprint's claim against ICO. Moreover, the Commission cannot be collaterally estopped from reasonably interpreting its own precedent.

ARGUMENT

I. STANDARD OF REVIEW.

This case principally involves the Commission's interpretation of its own rules and prior orders, which is "entitled to substantial deference." *AT&T Corp. v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006). Indeed, an "agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous." *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1034 (D.C. Cir. 1986); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency interpretation is "controlling" unless "plainly erroneous or inconsistent with the regulation").

Review under the Administrative Procedure Act is also highly deferential. The Court may reverse only if petitioners establish that the Commission's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300

(D.C. Cir. 2003). The FCC is entitled to "the greatest deference" on issues related to its spectrum reallocation polices and the payment of costs associated with the relocation of incumbent users. *See Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001).

II. THE COURT LACKS JURISDICTION OVER DBSD'S ARGUMENT THAT THE AGENCY IMPROPERLY DEFINED "ENTER THE BAND," WHICH IS MERITLESS IN ANY EVENT.

A. DBSD Failed To Raise "Enter The Band" Arguments Before The Commission And May Not Do So Now.

DBSD[3] devotes 17 pages of its brief to attacking the Commission's explanation of what it means to "enter the band" and thereby trigger cost-sharing obligations. It argues that the Commission acted retroactively, failed to give fair notice, and altered the definition of the term without acknowledging the change. Br. 28-44. All of those arguments are foreclosed because neither DBSD nor any other party raised them before the Commission.

The filing of a petition for agency reconsideration is "a condition precedent to judicial review" whenever a litigant "relies on questions of fact or law upon which the Commission … has been afforded no opportunity to

[3] ICO does not challenge the Report and Order portion of the *2010 BAS Order*. Br. 3.

pass." 47 U.S.C. § 405(a). *See*, *e.g.*, *Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 256 (D.C. Cir. 2008). This Court "has strictly construed that section, holding that [the Court] generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission." *In Re Core Commn'cns, Inc.*, 455 F.3d 267, 276 (D.C. Cir. 2006) (internal quotations omitted). That statutory bar applies whenever the Commission does not have a "fair opportunity" to address an issue. *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997); *accord Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998).

Thus, to preserve an issue for judicial review, the litigant either must have raised the issue before the agency in the first instance or seek reconsideration of the agency's order, so that the FCC has the opportunity to address the issue before it is called upon to defend itself in court. Petitioners took neither action here. And that failure is particularly acute here because in the *2009 BAS Order* the Commission expressly invited comment on a proposed definition of "enter the band," which the agency noted had not been defined previously. *Id.* ¶89 (JA 82). Despite that invitation, "[n]either MSS entrant addressed the proposed definition of 'enter the band' in their

comments." *2010 BAS Order* ¶47 (JA 209). Indeed, the pleadings filed by DBSD (as well as TerreStar) were completely silent on the issue.[4]

Given that silence, although the agency itself had raised the general issue of how to define "enter the band," the Commission had no opportunity to address any of the specific arguments now raised by DBSD, none of which are necessarily implicated by the general definitional question. *See Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (argument barred under section 405(a) where party "knew full well that the Commission would address" a matter but failed to raise its argument before the Commission). The Commission could not have known that its attempt to give meaning to the term would be attacked as retroactive, lacking in fair notice, and inconsistent with an allegedly settled earlier definition that petitioners never even mentioned in their comments.

DBSD apparently raised some of its current claims in pleadings filed in litigation pending before the courts and subsequently attached to submissions

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[4] DBSD would be wrong if it claimed on reply that it raised the issue by arguing that the Commission's "modification of the BAS cost-sharing requirements" would be impermissibly retroactive. *See* DBSD Comments at 9-13 (JA 121-125). That argument referred to the band cutoff date and not to the definition of "enter the band" – and the Commission reasonably understood that DBSD's comments did not raise any of the "enter the band" arguments that it now advances in its brief before this Court. *See WAIT Radio v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969) (argument must be "stated with clarity" to be preserved for judicial review), *cert. denied*, 409 U.S. 1027 (1972).

made to the FCC. Such pleadings, however, do not give the Commission a fair opportunity to confront an issue. The onus was on petitioners to raise their claims squarely in the main pleadings they filed with the Commission. The Commission has no responsibility to "sift pleadings and documents to identify" arguments that are not "stated with clarity" by a petitioner. *WAIT Radio,* 418 F.2d 1153, 1157 (D.C. Cir. 1969); *New Eng. Pub. Commc'ns Council, Inc. v. FCC,* 334 F.3d 69, 79 (D.C. Cir. 2003).

B. DBSD's Claims Fail On Their Merits.

1. The Commission Did Not Engage In Retroactive Rulemaking When Defining "Enter The Band."

DBSD argues that the Commission's definition of "enter the band" is impermissibly retroactive. Even if DBSD had preserved this argument, it lacks merit.

DBSD's theory is that it launched its satellite and certified the satellite as operational in reliance upon Commission precedent clearly establishing that those acts did not constitute entering the band. According to DBSD, the Commission retroactively changed the law to impose reimbursement obligations on the basis of the already completed launch and certification. Br. 30. In fact, the Commission changed neither the law nor any vested rights held by DBSD. Rather, from the outset, DBSD knew – and was repeatedly reminded by the Commission – that it would have to contribute a pro rata

share of relocation costs. The Commission's action fixing the starting date for that responsibility thus was not retroactive.

"[R]etroactivity law is concerned with the protection of reasonable reliance" on settled existing law. *Bergerco Canada v. U.S. Treasury Dept.*, 129 F.3d 189, 193 (D.C. Cir. 1997). Thus, administrative action is not retroactive merely because it is applied in "a case arising from conduct antedating" that action. *Landgraf v. USI Film Prods.,* 511 U.S. 244, 269 (1994). Rather, whether an administrative action is retroactive depends on "considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 270. The Court "must ask whether the legal status quo ante created 'rights' favorable to [the litigant] and later modified." *Bergerco*, 129 F.3d at 193. An action is retroactive only if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability." *National Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (citation and quotation marks omitted); *accord Arkema, Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010) ("A rule operates retroactively if it takes away or impairs vested rights" that are "substantively inconsistent" with prior agency practice).

The Commission's definition of "enter the band" was not retroactive. It did not change DBSD's rights and reimbursement obligations, nor did it

change the law. And DBSD did not take any action in reliance on an understanding of "enter the band" that would have allowed it to escape payment responsibility.

No new duty. The *2010 BAS Order* imposed no new duty on DBSD, which was always required to pay its share of BAS relocation costs. The *800 MHz Order* plainly contemplated as much, as it was premised on the idea that both MSS operators would launch their satellites and put them into operation before the 36-month 800 MHz band reorganization had been completed – a timeline based on a condition in the MSS authorizations themselves. *800 MHz Order* ¶270; *see 2010 BAS Order* ¶7 (JA 192). Thus, although the *800 MHz Order* did not directly define "enter the band," it used the phrase in a manner tied directly to the schedule contemplated at the time, under which DBSD would declare its satellite operational (a condition on its authorization) prior to the completion of band reorganization.

Moreover, throughout every stage of the 2 GHz band reorganization, the Commission consistently and repeatedly informed DBSD that it would be bound by "the cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit." *800 MHz Order* ¶261; *accord 1997 MSS Order* ¶72; *800 MHz Reconsideration Order* ¶111;

2008 BAS Order ¶15. That "important underlying principle[]" was central to the *Emerging Technologies* orders and is necessary to prevent free-ridership and deterrence to future licensees to "assume the burden and cost of clearing spectrum quickly if they were unsure of the likelihood that they will be reimbursed by other new entrants." *2010 BAS Order* ¶41 (JA 207). Thus, while the Commission's definition of "enter the band" clarified the precise point in time when DBSD's reimbursement obligation attached, it did not "impose a new duty" or "create a new obligation" that previously had not applied to DBSD.

For that reason, this case is unlike typical retroactivity cases such as *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), where the agency imposed *new* regulatory requirements that applied to past time periods when no such requirements existed. Unlike such cases, DBSD knew from the *800 MHz Order* that its MSS milestones were related directly to its obligation to share BAS relocation expenses. A subsequent clarification of the precise point at which that obligation began does not constitute a new duty. Thus, far more on point are cases like *Cookeville Regional Med. Ctr. v. Leavitt*, 531 F.3d 844, 849 (D.C. Cir. 2008), where the Court held that clarifications applied to past conduct were not retroactive because they did not upset any settled expectation. *See also Levy v. Sterling Holding Co.*, 544 F.3d 493, 506

(3d Cir. 2008) ("where a new rule constitutes a clarification – rather than a substantive change – of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does not have an impermissible retroactive effect").

No change to existing law. A "critical question" in assessing retroactivity "is whether the interpretation established by the new rule changes the legal landscape." *Arkema*, 618 F.3d at 7; *see National Mining*, 292 F.3d at 859 (to be retroactive, ruling must disrupt "vested rights" under "existing law"). DBSD asserts that it had a vested right not to contribute when it launched its satellite and certified it as operational because at that point "the law was clear" that doing so did not constitute entering the band. Br. 33. The gist of DBSD's claim is that prior to the *2010 BAS Order* the Commission had "consistently ruled" that "entering the band" was defined by a specific four-part test, which the Commission failed to apply in the order on review. Br. 30-31.

If the meaning of "enter the band" had been clear, DBSD presumably would have argued as much to the Commission after it requested comment on a proposed definition. Instead, DBSD did not even mention the four-part test in its comments. In any event, the argument DBSD now makes to the Court fails because it rests wholly on regulations addressing reimbursement

obligations applicable to services *other than* BAS. *See* 47 C.F.R. §§ 24.247(a) (PCS service); 27.1168(a) (2110-2150 MHz band); 27.1184(a) (BRS service). None of those regulations uses the term "enter the band." Nor are we aware of other FCC orders, including the *Emerging Technologies* orders, in any relocation proceeding other than BAS that used that term (and DBSD identifies no such order). Indeed, the Commission pointed out in the *2009* and *2010 BAS Orders* that prior orders in the 2 GHz proceeding "did not define the term." *2009 BAS Order* ¶89 (JA 82); *see 2010 BAS Order* ¶46 (JA 209); *cf. 800 MHz Order* App. C Rule 74.690 (defining "new entrants" to 2 GHz band as companies "proposing to … implement" MSS in the band). Thus, DBSD's argument that it met none of the four alleged criteria for entering the band, Br. 31-32, is beside the point. There were no established criteria for the 2 GHz band, and as a result the Commission could not have changed the law when it defined "entering the band."

To be sure, the rules cited by DBSD are used to determine when a reimbursement obligation attaches in the bands to which they apply. But the rules themselves – set forth for each service individually – make clear that the Commission determines the trigger point on a service-by-service basis and not by a one-size-fits-all rule for every situation.

The Commission never codified such a rule for BAS relocation. To the contrary, when the Commission allocated 2 GHz spectrum to AWS, it expressly deferred implementation of a cost-reimbursement plan for that service. *2003 MSS Order* ¶10. The following year, when the Commission allotted spectrum to Sprint and implemented an "equitable" cost-sharing plan, it did not rely on reimbursement rules established for other services, but only on the general principle that "the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit." *800 MHz Order* ¶261.

The Commission explained from the beginning of this proceeding that BAS band clearing was fundamentally unlike other band clearings and that MSS is technologically different from terrestrial services governed by the rules cited by DBSD. "The nature of BAS as an integrated, coordinated system, and the nationwide nature of MSS" requires a different "relocation framework than that contemplated in [the] *Emerging Technologies* proceeding." *2000 MSS Order* ¶42. That is because of the "substantial differences between BAS and [fixed service] microwave" facilities that were at issue in other bands (and that are governed by the regulations relied on by DBSD). *Ibid.* Fixed service "is far less integrated, consisting essentially of a large number of individual links, with coordination required only upon first

activation of any link." *Ibid.* In contrast, the "integrated nature of BAS, along with the nationwide … scope of MSS, makes a licensee-by-licensee relocation of BAS impossible." *Ibid.* "Because of the nationwide nature of MSS and … BAS," the Commission determined, "a market-by-market or system-by-system test" of the type used in other services would not be "practical or appropriate." *2010 BAS Order* ¶49 (JA 210-211); *see also 2008 BAS Order* ¶31 (BAS is an "entirely different service with many complexities" not present in moving fixed links).[5]

Far from impermissibly changing the law when it defined "enter the band," the Commission reasonably applied existing law to a new context. To interpret that phrase, the Commission relied on the concepts embodied in the *Emerging Technologies* proceeding. Specifically, "a later entrant is generally required to share in the cost that an earlier entrant has incurred … if the subsequent entrant would have caused interference to the incumbent licensees." *2010 BAS Order* ¶48 (JA 210). Under the approach applicable to other services (on which DBSD relies), the potential for interference would

[5] For those reasons, rules establishing the cost-sharing trigger in other services do not apply to BAS on their face. BAS does not have a "clearinghouse" to coordinate payments, *e.g.*, 47 C.F.R. § 24.247(a); it makes no sense to trigger cost-sharing based on a "microwave link," *id.* § 24.247(a)(1); and interference is not caused only by "turn[ing] on a fixed base station at commercial power," *id.* § 24.247(a)(3).

arise when an operator is prepared to use full commercial power. *See 2009 BAS Order* ¶89 & n.196 (JA 82). By contrast, an operational MSS satellite can never "operate without causing interference to the BAS incumbents," and potential interference thus would occur "when [an MSS provider] certifies that its satellite is operational." *2010 BAS Order* ¶49 (JA 210).

DBSD misinterprets a passage in one Commission order as evidence that the Commission had given "enter the band" a fixed meaning other than having an operational satellite prior to the *2010 BAS Order*. Br. 30, 40. In 2008, the Commission proposed to eliminate the top-30 market rule. Because of that proposal, the Commission held in abeyance a request to waive the rule, noting its "tentativ[e] conclu[sion]" that it would "eliminate the top 30 market rule to allow the MSS operators to enter the band in January 2009." *2008 BAS Order* ¶40. That "tentativ[e] conclu[sion]" cannot plausibly be understood as the promulgation of a settled definition of "entering the band" – particularly where the Commission explained that its prior orders in the 2 GHz proceeding "did not define the term," *2009 BAS Order* ¶89 (JA 82); *2010 BAS Order* ¶46 (JA 209). Such an understanding also would be inconsistent with the *800 MHz Order*, which was predicated on a temporal link between cost-sharing responsibility and the operational satellite milestone.

In short, rules governing the relocation of other services do not apply to BAS and MSS, which have unique technical characteristics. That matter lies within the agency's core technical expertise and is one on which the Commission's determinations are entitled to particular deference. *See Teledesic*, 275 F.3d at 84.

No reliance. DBSD's retroactivity argument also fails because DBSD cannot credibly claim that it launched its satellite and declared it operational in reliance on an understanding that doing so would not constitute entering the band. *See Bergerco*, 129 F.3d at 193.

DBSD took those actions in order to fulfill conditions on its spectrum authorization independent of its cost-sharing obligations to Sprint. Had DBSD failed to meet the established launch and operational milestones, it would have lost its authorization. *MSS Policies*, 15 FCC Rcd at 16178. In fact, DBSD expressly recognized that the launch of its satellite and the certification of it as operational were not undertaken in reliance on any understanding of its BAS cost-sharing responsibilities. In 2008, DBSD applied to the Commission to extend its launch and operational milestones. Sprint asked the agency to condition any milestone extension on DBSD's sharing of BAS relocation costs. DBSD opposed Sprint's requested condition on the ground that matters "concerning BAS relocation obligations" are

"irrelevant to [the] pending modification application." Letter of March 24, 2008, from Suzanne Hutchings Malloy to Marlene H. Dortch, Secretary, FCC at 2 (attached hereto).

In sum, although the Commission's definition of "enter the band" applied to an act that already had taken place, the definition did not impose any new obligation on DBSD, effectuate a change in the law, or undermine DBSD's reliance on a different definition. It therefore was not retroactive.

2. The Commission's Order Did Not Violate Fair Notice Principles.

DBSD next charges that the Commission's reading of "enter the band" violates principles of due process because DBSD lacked fair notice of that definition. That argument fails.

First, there was no failure of notice because DBSD (along with other MSS operators) was notified repeatedly of its responsibility to contribute toward BAS relocation costs. *See 1997 MSS Order* ¶72; *800 MHz Order* ¶261; *800 MHz Reconsideration Order* ¶111; *2008 BAS Order* ¶15.

Furthermore, as just explained, DBSD did not launch its satellite in reliance on any understanding of the term "enter the band" that was different from the one set forth in the order on review. By contrast, the fair notice cases cited by DBSD (Br. 36-37) involved parties that acted in reliance upon a regulation that was subsequently altered. In *Satellite Broad. Co. v. FCC*,

824 F.2d 1 (D.C. Cir. 1987), for example, an applicant for an FCC license sent its application to the wrong address in reliance on unclear directions in the FCC's rules. Similarly, in *Trinity Broad. of Florida, Inc. v. FCC,* 211 F.3d 618 (D.C. Cir. 2000), the licensee created a corporate structure in reliance on a reasonable reading of an FCC rule.

Finally, the fair notice doctrine does not apply at all to petitioners' cost-sharing obligation. While that doctrine "preclude[s] an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule," *Satellite Broad.,* 824 F.2d at 3, the key term is "penalizing": the fair notice doctrine applies only where an agency imposes punishment – such as a fine,[6] a mandatory product recall,[7] the dismissal or denial of an application,[8] or another type of criminal or civil sanction – for the violation of an ambiguous rule. In the "non-penal" context, the Court has declined to apply the doctrine. *Gates & Fox Co. v. OSHRC,* 790 F.2d 154, 156 (D.C. Cir. 1986); *see also General Elec.,* 53 F.3d at 1329-1330. Otherwise, the fair notice doctrine could not be reconciled with the general rule that adjudications, which frequently clarify ambiguous regulatory

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[6] *See Fabi Constr. Co. v. Sec. of Labor,* 508 F.3d 1077 (D.C. Cir. 2007); *General Elec. Co. v. EPA,* 53 F.3d 1324 (D.C. Cir. 1995).

[7] *See United States v. Chrysler Corp.,* 158 F.3d 1350 (D.C. Cir. 1998).

[8] *See Trinity,* 211 F.3d 618; *Satellite Broad.,* 824 F.2d at 3-4.

terms that result in monetary liability, are retroactive. *See Qwest v. FCC*, 509 F.3d 531 (D.C. Cir. 2007).

The due process concerns that underlie the fair notice doctrine in fact support the Commission's approach, not DBSD's. Sprint relied – at great expense – on the understanding that it would be reimbursed for a portion of its costs when other users entered the band. To let DBSD off scot-free on the ground that it lacked fair notice of its cost-sharing responsibilities would unfairly injure Sprint, which in that situation would have lacked notice that it would bear the entire expense itself.

3. The Commission Did Not Depart From Precedent When Defining "Enter The Band."

Finally, DBSD argues that the Commission "changed, without explanation, the meaning of 'entering the band.' " Br. 38. That claim rests on the same incorrect premises as DBSD's retroactivity argument and it fails for the same reasons. As explained at pages 36-39 *supra*, the Commission did not change the meaning of "enter the band," but defined it for the first time. To the degree that the Commission did not explain why it was not adopting the four-part test on which DBSD relies, that is because DBSD failed to raise that issue before the agency, which thus had no opportunity to explain why DBSD's test is inapposite.

DBSD also contends that the Commission abused its discretion by failing to adequately explain its supposed departure from another FCC "policy." Br. 42-44. According to DBSD, the Commission had previously implemented a "pay for benefit policy" under which no reimbursement obligation would attach until a band user could provide commercial service. Br. 42-44. But DBSD cites no source for such a policy, and the relevant BAS/MSS orders make no mention of it. DBSD may be referring to the rules discussed at page 37, *supra* – applicable to *other* services – under which the Commission assesses whether a licensee is prepared to use a transmitter at "commercial power." Even if that rule amounted to a "pay for benefit" approach, as we have explained, the Commission adopted no such rule for BAS/MSS, which is technologically far different from the services in which the commercial power rule applies.

In any event, DBSD benefited substantially from Sprint's band-clearing efforts. It will be able to use cleared spectrum without having undertaken the substantial relocation efforts. It also received a financial "float" from Sprint's bearing the expenses up front. Conversely, if DBSD had cleared the band, it would have borne those costs.

Nor is DBSD correct in claiming that it is unfair to set the point of entering the band upon certification of its satellite's operation. Br. 32, 42, 44.

DBSD posits a "Catch-22" in which the top-30 market rule prevented it from providing commercial service yet it still had to pay for relocation. Br. 42. That argument ignores the Commission's clear warnings that MSS operators had an obligation to clear the band independent of and equal to Sprint's. *800 MHz Order* ¶250; *2010 BAS Order* ¶60 (JA 214). Indeed, the Commission expressly recognized the effects of the top-30 market rule and reiterated that MSS entrants should engage in their own band clearing efforts if Sprint's schedule did not suit their needs. Yet DBSD neither objected to Sprint's schedule, nor engaged in any band clearing of its own, preferring to rely entirely on Sprint's effort and financing. *2008 BAS Order* ¶13. DBSD thus is wrong when it claims that it "could not have meaningfully engaged in BAS clearing on [its] own." Br. 14. The Commission determined that it should not "remove Sprint … from the process," *2008 BAS Order* ¶30, but it recognized at the same time that MSS operators retained "the obligation … to relocate the BAS licensees," *id*. ¶13.

Furthermore, although DBSD faults Sprint's efforts, Br. 12-13, the Commission found that there were "many valid reasons" for the delays in the proceeding. *2010 BAS Order* ¶26 (JA 199). Sprint had an incentive to act quickly because it was "unable to access its 5 MHz block" of spectrum in the 2 GHz band "due to … relocation delays," *ibid*., despite having spent $750

million on the process and relinquished $2 billion worth of spectrum in the 800 MHz band.

Contrary to DBSD's suggestion (Br. 42-44), there is nothing "arbitrar[y]" or "irrational" about requiring DBSD to pay its fair share of band-clearing costs in return for receiving a valuable future benefit. No rule or law or FCC precedent required DBSD to receive an income stream *before* bearing costs. Rather, cost-sharing here reflects the ordinary sequence in which outlays for relocation expenses necessarily precede revenue from new service. The same was true for Sprint. Indeed, if the MSS entrants had undertaken the relocation themselves, the time lag between expenses and revenues would have been even greater. DBSD's flawed logic also is inconsistent with MSS providers' independent band clearing obligations.

Finally, DBSD has not shown that it would have been able to provide service in the absence of the top-30 market rule. That rule was repealed in June 2009, yet as of December 2010, DBSD reported to the Commission that it had engaged only in "alpha testing" of its operations in a small handful of markets. *See* Annual Report of DBSD to FCC, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302445A1.pdf . The Commission determined that "the MSS entrants have suffered little harm from the delays in the BAS relocation." *2010 BAS Order* ¶57 (JA 213).

III. THE COMMISSION REASONABLY INTERPRETED PRIOR ORDERS REFERRING TO THE CUTOFF DATE, AND IT PROPERLY ESTABLISHED A FIXED CUTOFF DATE.

Petitioners contend that the *800 MHz Order* set a hard-and-fast reimbursement cutoff date of June 26, 2008, and that the order on review impermissibly sought to "revive" a "lapsed" reimbursement obligation when the Commission established December 9, 2013, as the new cutoff date. Br. 44-53. According to petitioners, that ruling constitutes impermissible retroactivity. *Id.*

If the Court does not reach or upholds the Commission's "enter the band" ruling, the question of the cutoff date will be moot. DBSD declared its satellite operational in May 2008 (Br. 13) – prior to June 26, 2008 – and thus entered the band at that time. At that point, it incurred a reimbursement obligation even if that obligation terminated on June 26, 2008, and there would no longer be a live controversy concerning the cutoff date. Should the Court reach the issue, however, petitioners' claims lack merit.

Petitioners' argument is based on the false premise that the *800 MHz Order* established a firm cutoff date of June 26, 2008. Paragraph 261 of that order stated that Sprint may seek reimbursement of "costs incurred during the 36-month reconfiguration period," and that it would "no longer be entitled to reimbursement … after receiving credit … at the 800 MHz true-up." *800*

MHz Order ¶261. On reconsideration, the Commission explained that paragraph 261 tied the cutoff to the true-up period. The reimbursement obligation would end, the Commission explained, "once the true-up is completed." *800 MHz Reconsideration Order* ¶112. The Commission rejected efforts to establish a different time period, deciding instead to "maintain the schedule previously established, *i.e.*, the true-up period." *Id.* ¶113. *See also 2008 BAS Order* ¶16 ("Prior to the true-up" Sprint "is entitled to seek a *pro rata* reimbursement," which ends only "[a]t the conclusion of the true-up.").

The Commission thus reasonably determined in the *2010 BAS Order* that the "36-month period" referred only to the timeframe in which "the 800 MHz reconfiguration *was expected* to be completed." *2010 BAS Order* ¶22 (JA 197) (emphasis added). In other words, that timeframe was employed in the *800 MHz Order* as shorthand for the reconfiguration and true-up period, not to establish a cutoff on a date certain – June 26, 2008. The Commission therefore properly rejected petitioners' "narrow" and "unreasonable" reading of its prior orders. *2010 BAS Order* ¶24 (JA 198). That reading not only was inconsistent with the Commission's explanation of the cutoff date in other orders, *800 MHz Reconsideration Order* ¶¶112-113; *2008 BAS Order* ¶16; *2009 BAS Order* ¶¶79-80 (JA 78-79), but also would "undermine the larger

principle that MSS entrants must pay their *pro rata* share of the BAS relocation costs." *2010 BAS Order* ¶24 (JA 198). The Commission's reasonable interpretation of its own orders is "controlling." *Auer*, 519 U.S. at 461.

The Commission also properly rejected petitioners' claim that the initial 36-month window in which Sprint had a right to reimbursement reflected an immutable balance of interests between Sprint and MSS operators. Br. 1, 11, 45, 48, 49, 52. Rather, the Commission was only "providing administrative efficiency in the accounting process" for 800 MHz band reconfiguration, and not "provid[ing] a benefit" to MSS operators or "a means for the MSS entrants to avoid paying BAS relocation expenses." *2010 BAS Order* ¶24 (JA 198). Indeed, freeing MSS operators from their cost-sharing obligation due to unexpected difficulties in band clearing would thwart the Commission's band-clearing policy and might cause future licensees to be "unwilling or unable to assume the burden and cost of clearing spectrum quickly if they were unsure of the likelihood that they will be reimbursed by other new entrants." *Id.* ¶41 (JA 207).

Because the Commission had not established a specific cutoff date, and the cutoff event (*i.e.*, the 800 MHz reconfiguration and true-up) had not yet occurred, the agency did not act retroactively in any sense when it

prospectively established a new date of December 9, 2013. *2010 BAS Order* ¶85 (JA 223). The new date is not primarily retroactive because it changes nothing about the past. The new date does not "alter[] the past legal consequences of past actions." *Bowen*, 488 U.S. at 219 (Scalia, J., concurring). Neither did the Commission "revive" an obligation that had "lapsed" or been "extinguished" (Br. 44, 46, 50); this case thus bears no similarity to the revival of a cause of action "after the pre-existing period of limitations ha[d] expired" (Br. at 46-47) (citation omitted).

The order does not entail secondary retroactivity because it upset no expectation that reimbursement responsibility would be cut off. The Commission had not established any firm cutoff date, but had tied the end of reimbursement responsibility to events – the completion of band reorganization and the true-up – that had no fixed timetable.

Finally, contrary to petitioners' argument (Br. 53-55), the Commission adequately explained why it prospectively established a firm cutoff at the band sunset date. That date was originally established as the point when reimbursement obligations would terminate. *2010 BAS Order* ¶21 (JA 196). Because "the main reason for allowing early termination of the new entrants' cost-sharing obligation no longer applies – *i.e.*, [Sprint] will probably not be taking credit for all of its BAS relocation costs against the anti-windfall

payment," the Commission explained that "there is no compelling reason to end the cost sharing obligation of the new entrants any earlier than the band sunset date." *Id*. ¶44 (JA 208-209).

IV. THE COMMISSION PROPERLY ESTABLISHED STANDARDS FOR DETERMINING ICO'S COST-SHARING RESPONSIBILITY.

In the Declaratory Ruling portion of the *2010 BAS Order*, the Commission identified circumstances under which ICO and other corporate affiliates of DBSD may be responsible for reimbursement of a share of BAS relocation costs.[9] ICO attacks that decision on three grounds: that the Commission lacks authority to hold corporate affiliates of an MSS licensee liable for reimbursement responsibilities or to treat affiliated companies as a unit for those obligations; that the decision is impermissibly retroactive; and that decisions by the bankruptcy court preclude the Commission's rulings. Those arguments lack merit.

[9] The MSS license is held by one of the bankrupt DBSD entities, all of which are subsidiaries of non-bankrupt ICO. Because Sprint's "recovery of any reimbursement claim against the bankrupt debtors will be governed by the proceedings in the bankruptcy court," *2010 BAS Order* ¶29 (JA 200), unless otherwise ordered by that court, any monetary claims resulting from the Commission's ruling on enterprise liability are limited to ICO. We therefore refer only to ICO in this section of the brief.

A. The Commission Has Authority To Require Reimbursement From Affiliated Companies Entering The Band As An Integrated Enterprise.

ICO's argument rests on the erroneous premise that, before the Declaratory Ruling on review, only the specific corporate entity holding an MSS authorization had reimbursement responsibility. Br. 61. From that flawed assumption, ICO asserts that the Declaratory Ruling unlawfully imposed a new "derivative" liability on ICO as the licensee's parent without meeting the standards for piercing the corporate veil. *Id*. at 55.

In fact, the Commission's prior orders had assigned responsibility to MSS "operators" and "entrants," not simply licensees. *See 2010 BAS Order* ¶29 n.68 (JA 201). The Declaratory Ruling interpreted those ambiguous terms, explaining that they are not – and never were – limited to the nominal licensee, *id*. ¶30 (JA 201), but instead could include additional entities that work with the licensee as an integrated enterprise to enter the band and operate an MSS system, *id*. ¶¶31, 35 (JA 202, 204-205). ICO does not challenge the reasonableness of the agency's construction of its prior orders, which, in any event, is "controlling." *Auer*, 519 U.S. at 461.

The Commission's decision therefore does not *shift* reimbursement responsibility from the licensee to others (Br. 55), but instead defines the scope of the *original* reimbursement obligation. In particular, the

Commission emphasized that affiliates are not being made derivatively liable for the licensee's obligations, but could be liable for their *own* actions as part of an integrated unit. *2010 BAS Order* ¶34 (JA 203-204) (explaining that enterprise liability as defined in the Declaratory Ruling is "distinct from the standards for 'piercing the corporate veil' or finding an 'alter ego' under common law").

United States v. Bestfoods, 524 U.S. 51 (1998), cited by ICO (Br. 56-57), is entirely consistent with the Commission's approach. There, the Court recognized at the outset that a parent could not be *derivatively* liable for its subsidiary's conduct under an environmental statute because Congress did not modify the common law in enacting the statute. But the Court nonetheless concluded that, because statutory liability attached to either the "owner" or "operator" of a facility, the parent could be *directly* liable as an "operator" of the facility – even if its subsidiary was nominally the facility owner. 524 U.S. at 64; *see also id.* at 71 (parent can also be liable if it operates alongside its subsidiary as a joint venture). Because the parent was directly liable "for its own actions," the standards for veil piercing were "simply irrelevant." *Id.* at 65 ("direct, personal liability … is distinct from the derivative liability that results from piercing the corporate veil") (citation and quotation marks omitted). Indeed, a parent cannot "hid[e] behind the

corporate shield" when it actually participated in the prohibited conduct. *Id.* Here, the FCC similarly made any "MSS entrant" or "MSS operator" responsible for relocation costs; ICO's veil piercing argument thus is equally "irrelevant." *See 2010 BAS Order* ¶34 n.85 (JA 204).

ICO is incorrect that the Commission lacks the statutory authority to treat separate corporate entities as a unit for regulatory purposes unless it applies the traditional common law requirements for veil piercing. Br. 57-58. As this Court has recognized, the Communications Act, not the common law, sets the standards for the Commission's regulatory authority. *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974). Consequently, when reviewing a Commission decision that recognized the practical reality that a parent and its affiliate may act in concert as an integrated unit, the Court "need not pause" to consider the "standards of the common law alter ego doctrine which would apply in a tort or contract action." *Id. See also Mansfield Journal Co. v. FCC*, 180 F.2d 28, 37 (D.C. Cir. 1950) (where one family controlled two newspapers in separate communities, the Commission could ascertain "the true locus of control" and treat the two corporations as a single entity for regulatory purposes). "Where the statutory purpose could … be easily frustrated through the use of separate … entities," the Commission may treat the separate entities "as one and the same for purposes of

regulation." *General Tel. Co. of the S.W. v. United States*, 449 F.2d 846, 855 (5th Cir. 1971).

ICO attempts to distinguish these cases on the ground that they preceded *Bestfoods*. Br. 58. But *Bestfoods* stands for the proposition that courts must look to the applicable law to determine treatment of parents and subsidiaries. For the FCC, the "applicable standard" comes from the Communications Act, not "court decisions involving civil suits." *Capital Tel.*, 498 F.2d at 738. Congress empowered the FCC to regulate communications services "in the public interest," *e.g.*, 47 U.S.C. §§ 201(a), 309(a), and granted the Commission regulatory authority over "all persons" engaged in "wire or radio communication" service, *id.* § 152(a), and addressed directly those entities that "control" a license, *id.* § 310(d). Under that broad mandate, the Commission has regularly treated corporate affiliates as a single entity where necessary to determine the true nature of a transaction and to ensure compliance with the Communications Act and Commission policies and regulations. *See 2010 BAS Order* ¶33 nn.79-82 (JA 203) (citing FCC decisions treating affiliated entities collectively for regulatory

purposes); *see also id*. ¶34 n.86 (similar decisions by other agencies) (JA 204).[10]

ICO also argues that *Capital Telephone* and similar cases concern only FCC actions denying license grants rather than those imposing financial liability. Br. 59-60. Those decisions, however, turn not on the type of FCC action being reviewed, but on the authorization granted to the Commission to ascertain "the true locus of control." *Mansfield Journal*, 180 F.2d at 37. Moreover, the reimbursement issue here arises in the context of band clearing for MSS licensees and establishing the conditions for the granting such licenses. For that reason, too, ICO's attempt to distinguish *Capital Telephone* fails.

Finally, contrary to ICO's assertion (Br. 59), the Declaratory Ruling does not penalize the DBSD licensee for its bankruptcy or discriminate against ICO as an affiliate of a debtor. Unlike the situation in *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003), cited by ICO (Br.

[10] *Tri-State Steel Constr. Co. v. Herman*, 164 F.3d 973 (6th Cir. 1999), relied on by ICO (Br. 56), merely illustrates that different statutory schemes generate different outcomes. There, the court refused to allow aggregation of assets among affiliates for purposes of the Equal Access to Justice Act. *Id*. at 979. By contrast, under the Communications Act, the FCC regularly aggregates the assets of affiliates of licensees to determine the qualification as a "small business" for participation in spectrum auctions. *See*, *e.g.*, *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633 (D.C. Cir. 1996).

59), the FCC is not a creditor in the bankruptcy case and is not seeking recovery from ICO under these rulings. The Commission made clear that it was not challenging the bankruptcy court's authority to determine payment to Sprint from the bankruptcy estate, *2010 BAS Order* ¶29 (JA 200-201).

B. The Declaratory Ruling Is Not Impermissibly Retroactive Because It Adjudicated A Dispute Between ICO And Sprint.

ICO attacks the Declaratory Ruling as an allegedly improper retroactive rulemaking and further contends that, even if the decision is an adjudication, it cannot have retroactive effect because it significantly changed the law of corporate liability. Br. 62-68. Neither argument withstands scrutiny.

1. The Declaratory Ruling Was An Adjudication.

"Adjudication is concerned with the determination of past and present rights and liabilities." *Bowen*, 488 U.S. at 219 (Scalia, J., concurring) (citation and quotation marks omitted). Rulemaking, by contrast, regulates "future conduct … [and] is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations." *Id.* at 218-219.

Under those standards, the Declaratory Ruling was an adjudication. The decision did not announce a new policy for future application, but instead

interpreted and clarified past orders for the narrow purpose of addressing the specific Sprint-ICO controversy, *see*, *e.g.*, *2010 BAS Order* ¶32 (JA 202) (Declaratory Ruling focused on "whether or not ICO Global is liable to Sprint Nextel"), and elucidated the standards that a district court will apply to determine liability after it has made the necessary factual findings. *Id.* ¶40 (JA 207).

ICO is wrong that the Declaratory Ruling must be treated as a rulemaking because it arose in a rulemaking docket. Br. 64. This Court rejected that same argument in *Qwest*, 509 F.3d at 536, upholding an adjudicatory ruling issued in a rulemaking docket, where the Commission initiated a rulemaking to resolve the issue, received comments in the rulemaking docket, and issued a declaratory ruling without giving prior notice to the parties of the Commission's intention to bifurcate the proceeding).[11]

ICO is also incorrect in arguing that the Declaratory Ruling is a rulemaking because the Commission generally described the factors it considered relevant to determining whether affiliates operate as an integrated

[11] ICO has shown no additional point of fact or law it would have raised had it been aware that the FCC would issue a declaratory ruling rather than a rule. *See Qwest*, 509 F.3d at 536. ICO made several *ex parte* presentations to the FCC concerning enterprise liability and retroactivity. *E.g.,* ICO *ex parte*, August 2, 2010 at 7-8 (JA 173-174). ICO suffered no prejudice from the bifurcation and points to none in its brief.

unit. Br. 63. The agency did so in the context of resolving the concrete dispute between Sprint and ICO concerning ICO's reimbursement obligations. That the reasoning of the Declaratory Ruling might apply to other controversies does not change its adjudicatory character. *See Qwest*, 509 F.3d at 536 (a declaratory ruling was an adjudication even though it applied generally to all calling cards).[12]

Finally, the decision was an adjudication even though the Commission concluded that the record was inadequate to render a decision applying the law to the disputed facts and rendering a judgment on ICO's liability. *2010 BAS Order* ¶40 (JA 207). In resolving the dispute between ICO and Sprint over the interpretation of ambiguous orders, the decision performed the essential function of a declaratory ruling – "terminating a controversy or removing uncertainty." *See* 47 C.F.R § 1.2. The Commission's further decision not to resolve the late-blossoming factual dispute regarding ICO's conduct after its 2005 corporate restructuring (*see* pages 22-23, *supra*) was within the FCC's "broad delegation" to formulate its own procedures. *See FCC v. Schreiber*, 381 U.S. 279, 290 (1965).

[12] ICO's reliance (Br. 63) on *Motion Picture Ass'n of Am. v. Oman*, 969 F.2d 1154 (D.C. Cir. 1992), is misplaced. There, the agency acknowledged that the action did not decide any specific controversy. *Id*. at 1157.

2. The Declaratory Ruling Was Not Impermissibly Retroactive.

Retroactivity is the "norm" for adjudicatory rulings that are merely "new applications of existing law, clarifications, and additions." *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006). ICO's argument that the Declaratory Ruling was impermissibly retroactive suffers from the same flaw as its attack on the merits – the mistaken premise that the decision "shifts" liability from the DBSD licensee to affiliates without first piercing the corporate veil. Br. 62. As explained above, the FCC changed no law, but only clarified ambiguous terms in its existing orders. That clarification was permissibly retroactive.

Although retroactive effect may be denied in cases of "manifest injustice," *AT&T,* 454 F.3d at 332, ICO has not and could not make that showing here. A "lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct." *Qwest*, 509 F.3d at 540. Moreover, any assessment of "manifest injustice" must recognize that the loss inflicted to one party by retroactivity may be matched by an equal loss to the other party from non-retroactivity. *Id*. at 540-541. Here, there is no "manifest injustice" in retroactive application of an order that may require ICO to pay a fair share of expenses incurred by Sprint for ICO's benefit.

C. Bankruptcy Court Decisions Do Not Preclude The Declaratory Ruling.

In a ruling on Sprint's proofs of claims against each of the bankrupt DBSD debtors, the bankruptcy court hearing the *DBSD* bankruptcy case interpreted "entrant" and "operator" as used in the FCC's pre-2010 orders to mean only the licensee and concluded that no current FCC rule or regulation imposes joint and several liability on corporate affiliates of a licensee for reimbursement costs. *See In re DBSD N. America, Inc.,* No. 09-13061 (Bankr. S.D.N.Y), Bench Order, Sept. 30, 2009 at 16-18 [Dkt. No. 434], *aff'd*, 427 B.R. 245 (S.D.N.Y. 2010). The FCC was not a party to the *DBSD* bankruptcy case; it filed an amicus brief solely to alert the bankruptcy court that the question of enterprise liability was pending before the Commission, which intended to address the issue "either as part of the final rule or as a separate order within the rulemaking proceeding clarifying the existing rules and orders." Brief for FCC as Amicus Curiae 15-16, Case No. 10-1322 [Dkt. No. 323] (Bankr. S.D.N.Y.). The court declined the Commission's request to make a primary jurisdiction referral to the agency on that question. Bench Order, Sept. 30, 2009 at 14-15.

ICO asserts (Br. 65-66) that the *DBSD* bankruptcy decision precluded the Commission from later interpreting "entrant" or "operator" to impose BAS relocation reimbursement obligations on ICO. ICO is flatly wrong.[13]

It is black letter law that *full* mutuality of parties is required for issue preclusion against the federal government. *See United States v. Mendoza*, 464 U.S. 154, 162-163 (1984); *see also Am. Fed. of Gov't Emps., Council 214 v. FLRA*, 835 F.2d 1458, 1462 (D.C. Cir. 1987) ("Collateral estoppel [runs] against the government only if mutuality of parties exists.") (citing *Mendoza*).[14] Here, there is *no* mutuality because neither the Commission nor ICO was a party to the *DBSD* bankruptcy proceeding.

For that reason, *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993), is inapposite. There, the Second Circuit held that once a claim is fully adjudicated between two private parties the FCC could not re-adjudicate that same claim involving the same parties. Here, the FCC has not sought to relitigate a matter fully and finally adjudicated between the same parties to a

[13] ICO claims (Br. 67) that the Commission was required to respond to the preclusion argument in the Declaratory Ruling, but no response is required to a claim that is plainly wrong under governing law. The FCC "need not address every comment," but only "those that raise significant problems." *Reytblatt v. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997).

[14] ICO argues that issue preclusion does not require mutuality (Br. 67 n.5), but that proposition applies to disputes between *private parties*.

prior litigation. *See 2010 BAS Order* ¶29 (JA 200). ICO was not a party to the *DBSD* bankruptcy case, and the bankruptcy court did not purport to enter a judgment on Sprint's claim against ICO – nor could the court have done so under its limited jurisdiction, *see Stern v. Marshall*, 131 S. Ct. 2594, 2608-2620 (2011).

Moreover, the bankruptcy court's decision did not purport to bind the FCC or prevent it from making its own decision on enterprise liability. Indeed, in reviewing the bankruptcy court's order, the district court emphasized that the "relevant issue" related only to Sprint's claim of joint and several liability against the bankrupt *debtors*, "not whether the FCC had the authority to impose such liability or whether future FCC orders could do so." *In re DBSD N. America, Inc.*, 427 B.R. at 255.

Finally, ICO's argument ignores *National Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005), which instructs that the Commission's reasonable construction of an ambiguous provision of the Communications Act will trump a contrary court decision that previously construed the same provision. The FCC is owed even greater deference when construing its own orders and rules. *See Global NAPS v. FCC*, 247 F.3d 252, 257-258 (D.C. Cir. 2001). Thus, the Commission is not precluded from reaching a reasonable interpretation of its own orders contrary to a prior

judicial construction. *See Levy*, 544 F.3d at 508-509 (applying *Brand X* to construction of agency regulations). Allowing the sequence of decisions to govern the Commission's interpretation of its BAS orders, as advocated by ICO, would produce the same "anomalous results" condemned in *Brand X*. *See* 545 U.S. at 983.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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September 7, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ICO GLOBAL COMMUNICATIONS (HOLDINGS) LTD., *ET AL.* PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 10-1322

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13,917 words.

/s/ Joel Marcus

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September 7, 2011

EXHIBIT

Letter of March 24, 2008 from New ICO Satellite Services
To Marlene H. Dortch, Secretary, FCC

ORIGINAL

FILED/ACCEPTED

MAR 2 4 2008

Federal Communications Commission
Office of the Secretary

March 24, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: New ICO Satellite Services G.P.
Call Sign: S2651; IBFS File Nos. SAT-MOD-20070806-00110,
SAT-AMD-20071109-00155

Dear Ms. Dortch:

New ICO Satellite Services G.P. ("ICO") submits this letter to address a late-filed ex parte submission to the Commission from Sprint Nextel Corporation ("Sprint").[1] In its letter, Sprint requests that the Commission place a condition on ICO's pending request to extend the remaining milestone dates for launching ICO's geostationary orbit satellite, ICO G1, and for commencing operation of ICO's 2 GHz mobile satellite service ("MSS") system.[2]

Sprint's comments are meritless. ICO just responded to the bulk of the claims Sprint makes here in a different proceeding in which the Commission, with ICO's substantial support, awarded Sprint an 18 month extension to meet its broadcast auxiliary service ("BAS") clearing obligations. ICO will not burden the Commission with repeating those points. The Commission has already granted Sprint extensive relief with respect to clearing BAS, and specifically did not modify or propose to modify the reimbursement requirements.[3] It is inappropriate to address reimbursement requirements in this proceeding. Moreover, the public comment period on ICO's milestone extension request ended months ago, so Sprint's comments are late-filed and should not be

[1] Letter from Lawrence R. Krevor, Vice President – Spectrum, Sprint, to Marlene H. Dortch, Secretary, FCC, IBFS File No. SAT-AMD-20071109-00155 (Mar. 18, 2008).

[2] *See* ICO Modification Application, File No. SAT-MOD-20070806-00110 (Aug. 6, 2007), *as amended by,* File No. SAT-AMD-20071109-00155 (Nov. 9, 2007).

[3] *Improving Public Safety Communications in the 800 MHz Band*, FCC 08-73, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking (Mar. 5, 2008).

considered.[4] Finally, Sprint has no standing because it has not shown or alleged harm that would result from the Commission's grant of ICO's requested extensions. Sprint's proposed condition, concerning reimbursement requirements, would not address any potential harm that could result from extension of ICO's milestones to April 15, 2008, and May 15, 2008, respectively.

Sprint's proposed condition, concerning BAS relocation obligations, is meritless, procedurally improper and irrelevant to ICO's pending modification application. Accordingly, ICO respectfully requests that the Commission dismiss Sprint's comments.

Respectfully submitted,

Suzanne Hutchings Malloy

Suzanne Hutchings Malloy
Senior Vice President, Regulatory Affairs

[4] *See* 47 C.F.R. § 25.154(a); FCC Public Notice, Policy Branch Information, Report No. SAT-00483 (Nov. 23, 2007).

CERTIFICATE OF SERVICE

I hereby certify on this 24th day of March 2008, a copy of the foregoing Letter has been served via first class mail, postage pre-paid, or electronic mail, as indicated (*), to the following:

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STATUTORY AND REGULATORY APPENDIX

47 U.S.C. § 405(a)
47 C.F.R. § 24.247(a)
47 C.F.R. § 27.1168(a)
47 C.F.R. § 27.1184(a)

47 U.S.C. § 405(a)

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered

evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 C.F.R. § 24.247(a) (2010)

§ 24.247 Triggering a Reimbursement Obligation.

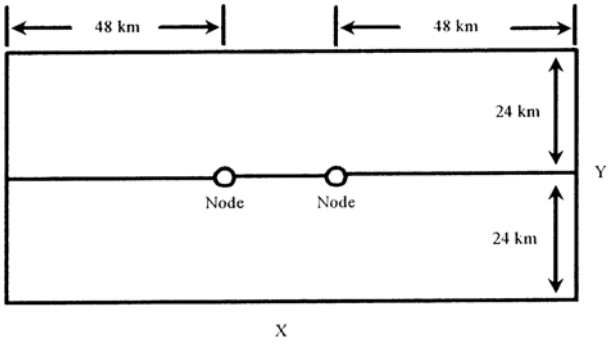
(a) *Licensed PCS*. The clearinghouse will apply the following test to determine if a PCS entity preparing to initiate operations must pay a PCS relocator or a voluntarily relocating microwave incumbent in accordance with the formula detailed in § 24.243:

(1) All or part of the relocated microwave link was initially co-channel with the licensed PCS band(s) of the subsequent PCS entity;

(2) A PCS relocator has paid the relocation costs of the microwave incumbent; and

(3) The subsequent PCS entity is preparing to turn on a fixed base station at commercial power and the fixed base station is located within a rectangle (Proximity Threshold) described as follows:

(i) The length of the rectangle shall be *x* where *x* is a line extending through both nodes of the microwave link to a distance of 48 kilometers (30 miles) beyond each node. The width of the rectangle shall be *y* where *y* is a line perpendicular to *x* and extending for a distance of 24 kilometers (15 miles) on both sides of *x*. Thus, the rectangle is represented as follows:



(ii) If the application of the Proximity Threshold test indicates that a reimbursement obligation exists, the clearinghouse will calculate the reimbursement amount in accordance with the cost-sharing formula and notify the subsequent PCS entity of the total amount of its reimbursement obligation.

47 C.F.R. § 27.1168(a) (2010)

§ 27.1168 Triggering a Reimbursement Obligation.

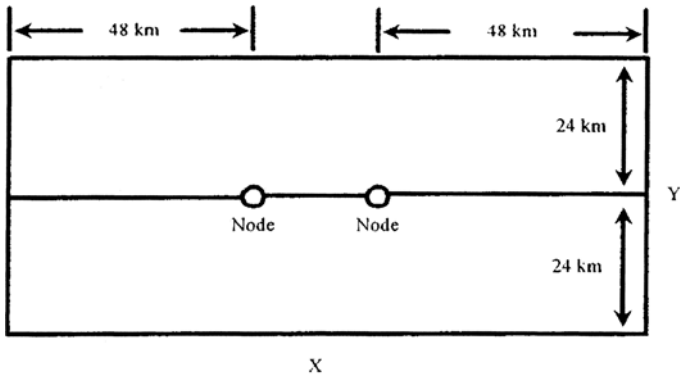
(a) The clearinghouse will apply the following test to determine when an AWS entity or MSS/ATC entity has triggered a cost-sharing obligation and therefore must pay an AWS relocator, MSS relocator (including MSS/ATC), or a voluntarily relocating microwave incumbent in accordance with the formula detailed in § 27.1164:

(1) All or part of the relocated microwave link was initially co-channel with the licensed AWS band(s) of the AWS entity or the selected assignment of the MSS operator that seeks and obtains ATC authority (see § 25.149(a)(2)(i) of this chapter);

(2) An AWS relocator, MSS relocator (including MSS/ATC) or a voluntarily relocating microwave incumbent has paid the relocation costs of the microwave incumbent; and

(3) The AWS or MSS entity is operating or preparing to turn on a fixed base station (including MSS/ATC) at commercial power and the fixed base station is located within a rectangle (Proximity Threshold) described as follows:

(i) The length of the rectangle shall be *x* where *x* is a line extending through both nodes of the microwave link to a distance of 48 kilometers (30 miles) beyond each node. The width of the rectangle shall be y where y is a line perpendicular to *x* and extending for a distance of 24 kilometers (15 miles) on both sides of *x*. Thus, the rectangle is represented as follows:



(ii) If the application of the Proximity Threshold Test indicates that a reimbursement obligation exists, the clearinghouse will calculate the reimbursement amount in accordance with the cost-sharing formula and notify the AWS or MSS/ATC entity of the total amount of its reimbursement obligation.

47 C.F.R. § 27.1184(a)

§ 27.1184 Triggering a reimbursement obligation.

(a) The clearinghouse will apply the following test to determine when an AWS entity has triggered a cost-sharing obligation and therefore must pay an AWS relocator of a BRS system in accordance with the formula detailed in § 27.1180:

(1) All or part of the relocated BRS system was initially co-channel with the licensed AWS band(s) of the AWS entity;

(2) An AWS relocator has paid the relocation costs of the BRS incumbent; and

(3) The other AWS entity has turned on or is preparing to turn on a fixed base station at commercial power and the incumbent BRS system would have been within the line of sight of the AWS entity's fixed base station, defined as follows.

(i) For a BRS system using the 2150-2160/62 MHz band exclusively to provide one-way transmissions to subscribers, the clearinghouse will determine whether there is an unobstructed signal path (line of sight) to the incumbent licensee's geographic service area (GSA), based on the following criteria: use of 9.1 meters (30 feet) for the receiving antenna height, use of the actual transmitting antenna height and terrain elevation, and assumption of 4/3 Earth radius propagation conditions. Terrain elevation data must be obtained from the U.S. Geological Survey (USGS) 3-second database. All coordinates used in carrying out the required analysis shall be based upon use of NAD-83.

(ii) For all other BRS systems using the 2150-2160/62 MHz band, the clearinghouse will determine whether there is an unobstructed signal path (line of sight) to the incumbent licensee's receive station hub using the method prescribed in "Methods for Predicting Interference from Response Station Transmitters and to Response Station Hubs and for Supplying Data on Response Station Systems. MM Docket 97-217," in Amendment of 47 CFR parts 1, 21 and 74 to

Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 14566 at 14610, Appendix D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ICO Global Communications Limited, Petitioner,

v. **10-1322**

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that on September 7, 2011, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Counsel listed below who are registered CM/ECF users will be served by the CM/ECF system. Others, marked with asterisks, will be served by U.S. Mail, unless another attorney at the same address is receiving electronic service via CM/ECF.

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